

CANADA / JUDGMENT

Uy v. Dhillon

2020 BCCA 163

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 163 Uy v. Dhillon COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Uy v. Dhillon, 2020 BCCA 163 Date: 20200525 Dockets: CA46223; CA46225 Docket: CA46223 Between: Johnberlyn Uy, by his litigation guardian, Elvis Amurao Respondent (Plaintiff) And Daljit Singh Dhillon and Day & Ross Inc. Appellants (Defendants)

- and - Docket: CA46225 Between: Ma Cezza De Leon Respondent (Plaintiff) And Johnberlyn Uy Respondent (Defendant) And Daljit Singh Dhillon and Day & Ross Inc. Appellants (Defendants) Before: The Honourable Madam Justice Dickson The Honourable Mr. Justice Abrioux The Honourable Madam Justice DeWitt-Van Oosten On appeal from: An order of the Supreme Court of British Columbia, dated June 14, 2019 (Uy v. Dhillon, 2019 BCSC 1136, Vancouver Docket M158435). Oral Reasons for Judgment Counsel for the Appellants, appearing via videoconference: G.T. Palm C. Purewal Counsel for the Respondent, Johnberlyn Uy, appearing via videoconference: R. Mogerman, Q.C. M. Kazimirski S. Kovacs Place and Date of Hearing: Vancouver, British Columbia May 19, 2020 Place and Date of Judgment: Vancouver, British Columbia May 25, 2020 Summary: The appellants appeal from an order finding them 100% liable for a motor vehicle accident that occurred between a tractor-trailer operated by Mr. Dhillon and a vehicle driven by the respondent, Mr. Uy. The appellants argue the judge made palpable and overriding errors of fact by omitting key objective evidence and drawing inferences that were unsupported by the evidence. Held: Appeal dismissed. The judge did not misapprehend the evidence or otherwise err in reaching her factual or legal conclusions.

- [1] DICKSON J.A.: These appeals concern a liability determination in two actions arising out of a serious motor vehicle accident. Daljit Dhillon was driving a tractor-trailer combination owned by Day & Ross Inc. on the Coquihalla Highway when a vehicle driven by Johnberlyn Uy collided with the rear end of the tractor-trailer, injuring Mr. Uy and his passenger, Ma De Leon. Both commenced actions against Mr. Dhillon and Day & Ross in which they alleged that Mr. Dhillon's negligence was the sole cause of the accident. Following a nine-day trial, Justice Marzari agreed and found that Mr. Dhillon's tractor-trailer encroached on Mr. Uy's established lane of travel suddenly and without warning, causing Mr. Uy to take evasive action, lose control of his vehicle and hit the back of the Dhillon vehicle.

- [2] Mr. Dhillon and Day & Ross appeal Justice Marzari's liability determination. No errors of law are advanced. The only issues raised by the appellants in this Court are whether the judge misapprehended Ms. De Leon's evidence and committed palpable and overriding errors in finding that Mr. Dhillon caused the collision by moving suddenly into Mr. Uy's established path and failing to find Mr. Uy was in the process of passing the tractor-trailer when the accident occurred. As a result, they say, she did not properly analyse the extent, if any, to which both drivers met their respective obligations and had she done so, she would have concluded that, as the rear-ending driver, Mr. Uy negligently caused the accident or, at least, that his failure to ensure he could pass the tractor-trailer safely was a contributing cause.
- [3] I do not accept that Justice Marzari misapprehended Ms. De Leon's evidence or erred otherwise in reaching her factual or legal conclusions. On the contrary, in my view she assessed the entire body of evidence in a careful, thorough, error-free manner, made factual findings supported by the evidence and drew available inferences from those findings, then applied the governing legal principles to the facts that she found. To explain this view, I will briefly review the facts surrounding the accident and key aspects of the judgment below, then address the appellants' arguments on appeal.
- [4] The accident occurred in the early morning hours of January 31, 2014 on a curving downhill section of the Coquihalla Highway about 750 metres past the Zopkios Brake Check station. There are three highway lanes running in each direction at this location with opposing lanes separated by concrete barriers, although road lines were not visible due to winter conditions and the judge found that the highway was effectively operating as a two-lane highway at the time. This finding was unchallenged on appeal. For passenger vehicles, the primary travelled portion of the highway straddled the marked middle and left lanes, with passable roadway but no defined lane to the left and snow at the concrete divider encroaching on what would have been the far left lane. To the right of the primary travelled path, there was more than a full lane-width of roadway available for heavier vehicles such as trucks.
- [5] The Uy vehicle and the Dhillon tractor-trailer were both travelling toward Hope, British Columbia at the time of the accident. The key factual question for determination at trial was the cause of the Uy vehicle's loss of control. Mr. Uy had no memory of the accident due to his injuries, but Ms. De Leon and Mr. Dhillon provided competing versions of the surrounding circumstances. The parties also relied on an agreed statement of facts, testimony from police, highway maintenance and other witnesses and expert accident reconstruction evidence.
- [6] Just prior to the accident, Mr. Dhillon had stopped at the brake check station. He testified that when he returned to the highway he decided to overtake a slower Super B tractor-trailer combination travelling ahead of him in the right lane and, for this purpose, moved into the middle lane, where, he said, he was well-established when he felt the impact of the collision from behind. In contrast, Ms. De Leon testified that Mr. Dhillon's tractor-trailer encroached suddenly and without warning into the established lane of the Uy vehicle, which was the primary travelled path that straddled the middle and left lanes of the highway. This sudden

encroachment cut them off, she said, and caused Mr. Uy to steer sharply to the right in an unsuccessful attempt to avoid a collision.

[7] The judge analysed these competing versions of events taking into account the credibility of the witnesses and the photographic, physical and expert evidence. Ultimately, she rejected much of Mr. Dhillon's testimony, interpreted and accepted much of Ms. De Leon's testimony and made factual findings regarding the accident based on the whole of the evidence:

[140] With respect to the accident itself, Ms. De Leon testified that Mr. Dhillon's tractor-trailer encroached into their lane ahead of them without signals or warning. She says that Mr. Uy steered very hard to the right to try to avoid the trailer, but Mr. Uy's side of the car collided with the rear of the trailer. She gave this evidence without leading and in various different ways throughout her testimony, and it is clear that her recollection has been largely unchanged since giving her first sworn statement to this effect a couple of weeks after the accident.

[141] At trial, Mr. Dhillon's evidence in direct was that he had decided to overtake the longer and heavier Super B, had already made his lane change to do so into the middle lane, that the lane markings were clear, and that he was well established in this middle lane for three to four minutes and abreast of the Super B before he felt the impact from behind. He was adamant that he had not recently changed lanes and was not in the process of changing lanes in the moments leading up to the collision, that he was in the middle lane of traffic, and that faster traffic approaching from behind had access to the third lane to his left.

[144] There are a number of matters upon which I did not find Ms. De Leon's evidence to be reliable, particularly in her cross. She did not accurately remember that there was snow on the road. She was asked what lane she was in and when Mr. Uy moved to the left lane to pass Mr. Dhillon, and she was clearly confused by this and her answers were similarly confusing. Although she used the word "overtake" to describe that Mr. Uy's vehicle was about to pass Mr. Dhillon's tractor-trailer on the right, her evidence overall does not support the suggestion that Mr. Uy was changing lanes in order to pass Mr. Dhillon's tractor-trailer combination, but rather that it remained in its lane of travel in anticipation of passing the tractor trailer in the right lane, and that the tractor-trailer encroached into their lane of travel from the right.

[145] Having considered all of her evidence, I find her evidence that the tractor-trailer appeared without warning to encroach in the lane she and Mr. Uy were travelling in immediately before the accident to be reliable and credible. She was clear and un-shaken in this memory at trial, demonstrating with her hands as well as her words the trailer coming partially into their lane of travel and her recollection of Mr. Uy steering sharply to the right to avoid a collision. There is no inconsistency in her evidence if it understood that her reference to the fact that Mr. Uy was preparing to "overtake" Mr. Dhillon meant passing in the left lane while Mr. Dhillon was in the right. This confusion of language is entirely understandable in the context of English being her second language, and the English

language not being abundantly clear in the distinction between these two terms in any event.

- [159] I therefore find on all the evidence, including the oral evidence at trial and the photographic, physical and expert evidence, that Mr. Dhillon was not established in the middle lane for any measurable length of time before the collision.
- [162] Just prior to impact, I find that Ms. De Leon's evidence and the physical evidence as I have described above, establish that Mr. Dhillon was in the process of moving to the left into what would ordinarily be the middle lane, but in fact encroached upon the primary lane of travel that Ms. De Leon and Mr. Uy were traveling in, with the goal of passing the Super B ahead of him that was fully occupying the right lane and was likely encroaching into the middle lane as well, although that may not have been apparent to Mr. Dhillon.
- [163] At the time of impact, Mr. Dhillon's tractor had just moved fully into what was ordinarily the middle lane encroaching on the primary path of travel and was, I find, still moving gradually to the left and his rear trailer was still straddling the right and centre lane
- [8] The judge found that Mr. Uy's vehicle was established in the primary path of travel when Mr. Dhillon moved the tractor-trailer to the left into what would ordinarily have been the middle lane of the highway. Although it was there to be seen, she found, Mr. Dhillon failed to see the Uy vehicle when he made the move to the left. She concluded that Mr. Dhillon was negligent in moving to overtake the Super B without ensuring he would not encroach on Mr. Uy's path of travel. She also concluded that the sudden encroachment caused the collision:
- [173] In conclusion, Mr. Dhillon had a duty to be aware of the traffic around him and to be patient and watch for emerging traffic from his blind spots before commencing or continuing with his lane change. In conditions where the highway lane markings were not visible, I find Mr. Dhillon had a duty to be aware of the actual paths of travel of vehicles in the faster lane to his left, and not to move to overtake another commercial vehicle unless he was sure it was safe to do so.
- [174] At the time of the collision Mr. Uy's vehicle was there to be seen. He was established in the primary path of travel and his headlights were on, and Mr. Dhillon had a 300 metre rearward view in his mirrors. Mr. Dhillon's failure to see Mr. Uy and in moving to overtake the Super B without ensuring that he would not encroach on Mr. Uy's path of travel was negligent.
- [175] I find that the cause of this collision was the sudden encroachment of Mr. Dhillon's tractor-trailer combination into Mr. Uy's established path of travel.
- [9] The judge went on to find that the appellants were not entitled to rely on the presumption of liability in rear-end collisions. She held there was nothing Mr. Uy could reasonably have done to avoid the collision and that, therefore, he was not contributorily negligent:

- [178] As I discussed above, there is a presumption or onus in rear-end collisions that the following driver is at fault for failing to keep a safe distance for the conditions. In the ordinary case these are conditions that involve one vehicle following another and failing to stop in time when the lead car stops unexpectedly.
- [179] This is not that typical case
- [180] I find that the defendants are not able to rely on the presumption of liability in rear-end collisions, or putting it another way I find that the presumption in those cases has been rebutted on the proven facts.
- [186] I conclude that there was nothing that Mr. Uy could have reasonably done to avoid the collision. He was driving well below the speed limit. His Honda had snow tires and his headlights were activated. There is no evidence to suggest that Mr. Uy's Honda had any mechanical problems that could have contributed to the collision. There is no reliable evidence to suggest that Mr. Uy was distracted.
- [187] I find the defendants have not established that Mr. Uy was contributorily negligent or that he contributed to Ms. De Leon's injuries.
- [10] On appeal, the appellants concede that the judge was entitled to reject Mr. Dhillon's testimony in making her liability determination. However, they submit, she misapprehended Ms. De Leon's evidence and because of the misapprehension, erroneously found that the accident was caused by Mr. Dhillon's sudden and abrupt lane change. In particular, they say, Ms. De Leon testified that the Uy vehicle was travelling predominantly in the right lane of the highway, not the left lane, and that immediately prior to, or even concurrent with Mr. Dhillon's passing manoeuvre, Mr. Uy moved to the left to overtake the Dhillon tractor-trailer. They say his move obliged Mr. Uy to ensure that he could pass the Dhillon tractor-trailer safely, but the judge failed to analyse this important issue because she misapprehended the true import of Ms. De Leon's testimony.
- [11] In other words, the appellants submit that Ms. De Leon's actual testimony undercut the key factual finding upon which the judge based her liability determination, namely, that the Dhillon tractor-trailer moved suddenly into the Uy vehicle's established path of travel. In their submission, this key finding was clearly erroneous and it caused the judge to fail to consider a key aspect of the requisite analysis, namely, whether Mr. Uy met his obligation to ensure that he could pass the tractor-trailer safely when he did. In the absence of the erroneous finding, they say, she should have applied the so-called presumption of liability for a rear-end accident and imposed liability on Mr. Uy. In support of their submission, they emphasize the following portion of Ms. De Leon's cross-examination and argue that, properly understood, it explains why Mr. Dhillon did not see the Uy vehicle prior to the collision: Q: Okay. And you -- were you in the -- so you were in the fast lane? A: Yes. Q: And trying to pass the truck. A: Overtaking. Q: Yes. So the driver of the truck, I'd expect, will say, when he gives evidence, that you were actually behind his truck, in the same lane A: No. Q: No? A: We were actually -- we were ready -- we were going - ready to overtake the truck.

We're on the side, in the fast lane, and the truck is in the right lane. Q: So did you have to change lanes to get into the fast lane to pass the truck? A: Before -- because we were actually always driving on the right lane. Q: The right lane meaning the truck -- the lane the truck was in? A: Yes. But when we saw the -- when John saw the truck he went to the left to overtake the truck.

- [12] The appellants also submit that the judge failed to consider whether Mr. Uy should have moved further to the left, which was passable, not to the right, when he attempted to avoid the collision. Taking into account all of the evidence, they say it is apparent that Mr. Uy should have moved to the left and that his failure to do so was a contributorily negligent cause of the accident.
- [13] In my view, the judge's detailed analysis of the evidence, including Ms. De Leon's testimony, as quoted above, fully answers the appellants' submissions, which, with respect, amount to an attempt to re-try the case on appeal based on a new theory, a different interpretation of key testimony and new factual findings. As is apparent from paragraphs 144 and 145 of her reasons, the judge carefully assessed Ms. De Leon's evidence, including the cross-examination, and she interpreted it in an entirely reasonable and available way. Regardless of whether Mr. Uy moved from the right lane into the left lane at some point prior to the accident, based on the judge's interpretation of Ms. De Leon's evidence her finding that the Uy vehicle was already established in its primary travelled path when the accident happened is unassailable. As the appellants acknowledge, her finding that the tractor-trailer suddenly moved into their established path and her liability determination follow from that finding. As to the appellants' arguments regarding the presumption of liability for rear-end collisions and contributory negligence, the judge considered and rejected them, as she was entitled to do.
- [14] For these reasons, I would dismiss the appeal.
- [15] ABRIOUX J.A.: I agree.
- [16] DEWITT-VAN OOSTEN J.A.: I agree.
- [17] DICKSON J.A.: The appeal is dismissed. "The Honourable Madam Justice Dickson"

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